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EX PARTE OR LATE FILED

November 3, 1999

Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 99-295

Dear Ms. Salas:

Due to the lateness of the hour, Covad is filing this ex parte on the day following the ex parte meeting. On November 2, 1999, Jason Oxman and Meghan Henning of Covad Communications met with Claudia Pabo, Daniel Shiman, Julie Patterson, Johanna Mikes, Renee Terry, Raj Kannan, and Rhonda Lien regarding Bell Atlantic's New York 271 application. Covad discussed the Department of Justice recommendation that the Commission reject the application, as well as the importance of ensuring that BOCs do not use the 271 process as precedent in other proceedings. Covad cited as an example SBC's claim that the FCC had ruled conclusively that SBC's refusal to provide line sharing to other carriers while it provided it to itself was not anti-competitive, despite a clear statement from the Commission in the context of the SBC-Ameritech merger that SBC should not make such a claim. A copy of SBC's brief is attached.

Covad also discussed the fact that the New York PSC has not yet ruled that Bell Atlantic's loop pricing is properly based on TELRIC methodology. Finally, Covad

Hamilton Square • 600 14th Street, NW • Suite 750 • Washington, DC 20005
Phone 202 220-0400 • Fax 202 220-0401 • http://www.covad.com

discussed Bell Atlantic's loop tariff filed in New York, but not yet approved by the PSC, and argued that a $100 charge for a conditioned loop is not a TELRIC price, and thus Bell Atlantic is not providing non-discriminatory access to loops as required by the 1996 Act.

Very truly yours,

Florence Grasso

Florence M. Grasso

cc: Claudia Pabo
Julie Patterson
Johanna Mikes
Daniel Shiman
Renee Terry
Raj Kannan
Rhonda Lien

DOJ Agrees with Covad that BA fails the checklist

In its Comments, Covad advanced two principal arguments:

(1) Bell Atlantic has failed to adduce *prima facie* evidence that it actually provides nondiscriminatory access to unbundled loops;
(2) Bell Atlantic has failed to adduce *prima facie* evidence that it actually provides nondiscriminatory access to OSS.

The Department of Justice also concludes that Bell Atlantic has failed on both these checklist items.

> **"Bell Atlantic has completed most – but not all – of the actions needed to achieve a fully and irreversibly open market in New York." DOJ Evaluation at 1.**

The FCC must accept DOJ's conclusion that BA has not satisfied the checklist based on the current record:

- "Because the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, the BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof." Second BellSouth Louisiana 271 Order at para. 52.
    - Post-filing date data cannot be used. "[W]e limit our analysis to factual evidence proffered by BellSouth on the date of its application and evidence in its replies that is directly responsive to arguments raised by parties commenting on its application." Second BS Louisiana 271 Order at para. 52 n. 140

- The FCC must base its decision on the record and nowhere else. The record demonstrates beyond question that Bell Atlantic is not in compliance with the Act.

The FCC must not permit BOCs gaining 271 approval in the future to cite the grant of the application as an FCC finding of BOC compliance with the Act.

- **The FCC must make clear that the 271 process is an adjudication of checklist compliance, and that a determination by the FCC that a BOC has complied with the checklist in no way means that the BOC has complied with all of the requirements of section 251.**
- **Absent such language, BOCs will seek to avoid FCC and state enforcement action and judicial proceedings by arguing that the FCC has concluded that the BOC's market has been "fully and irreversibly opened to competition."**
    - **Example: SBC, despite language in the FCC's SBC/Ameritech merger order instructing not to do so, claims in court proceeding that the FCC concluded that SBC's failure to provide line sharing to competitors while it provided it to itself was not anticompetitive.**

DOJ Conclusion 2: Bell Atlantic relies too heavily on the KMPG test, because that test did not test DSL loops or OSS systems:

- **"The KPMG test, however, was not designed to address all significant aspects of Section 271 compliance. Most significantly, the transactional aspects of KPMG's test focused primarily on Bell Atlantic's computer systems and did not comprehensively assess the manual processing and provisioning of orders, areas that are critical to our evaluation. Further, KPMG's test could not exactly replicate commercial use of Bell Atlantic's systems' for this reason, concurrent commercial use of these systems significantly enhances our knowledge about their strengths and capabilities." DOJ Eval. at 5.**

No DSL data included in KPMG test:

- **"At the NYPSC's request, KPMG participated in a one-day observation at a DSL CLEC. DSL was not a component of the formal test plan, and KPMG's informal observations do not appear in the final report. 7/29/99 Technical Conference Transcript at 3669-3672." DOJ Eval. at 6, fn. 7.**

DOJ Concludes that Bell Atlantic fails the OSS checklist item:

- **OSS Pre-ordering: "[W]e cannot conclude on the current record that Bell Atlantic is currently providing adequate access to preordering information needed to provide DSL services." DOJ Eval. at 26.**

- **OSS Ordering: "At the present time, orders for DSL loops do not flow through Bell Atlantic's ordering systems, but must be manually processed before entry into the provisioning systems." DOJ Eval. at 26.**

- **OSS Provisioning: "As to Bell Atlantic's historical performance in provisioning DSL loops, we are unable to conclude on the current record that Bell Atlantic has demonstrated an acceptable level of performance." DOJ Eval. at 26-27.**

DOJ concludes that Bell Atlantic's OSS is barely accessible to CLECs

- ". . . Bell Atlantic's EDI documentation has been so unstable that it has impaired CLEC ability to develop these interfaces . . . ." DOJ Eval. at 34.

    - Bell Atlantic proposed series of improvements on Oct. 8, 1999, to try to increase flow-through percentage from 52% today to 62-67% by Oct. 30, 1999, and then to 67-72% by Dec. 18, 1999, and to 72-77% by June 2000. DOJ Eval at 35, n. 96. "The results of these process improvements, however, do not appear in the current record." DOJ Eval. at 36.

- New York PSC has started a collaborative DSL process, "[b]ut because Bell Atlantic filed this application before the results of those efforts can be seen, we cannot conclude that CLECs currently have access to DSL loops necessary for them to compete effectively." DOJ Eval. at 28.

DOJ rejects post-271 approval performance promises as inadequate to satisfy the Act

- "Post-271 entry performance commitments should not be relied upon to ensure implementation of the process improvements necessary to open the market." DOJ Eval. at 36.

    - BA can request waivers, and engage in litigation. "This creates the potential for litigation and delay in imposing penalties and uncertainty that inadequate performance will in fact be punished." DOJ Eval. at 39.

    - BA has already sought 17 months of data waivers for their retail performance regulatory plan since Sept. 1995. DOJ Eval. at 39, n. 105.

DOJ Conclusion: The record only supports denial of BA's application:

- "Based on the current record, Bell Atlantic has not yet demonstrated that it provides wholesale services sufficient to support fully open competition based on the unbundled element mode of entry." DOJ Eval. at 13.

- "It is clear to the Department that Bell Atlantic should be required to demonstrate additional progress in solving the remaining problems before it is permitted to enter the long distance market." DOJ Eval. at 41.

- "It is, therefore, our judgment that Bell Atlantic should not be permitted to offer such services [long distance] until it demonstrates that it has solved the existing problems in its provision of access to unbundled network elements." DOJ Eval. at 42.

DOJ recommends two possible outcomes:

Option One: Covad's recommended option.

(1) Deny BA's application with specific listing of what it needs to improve. DOJ Eval. at 42.

Clearly the only legal option that the Commission should exercise, given BA's failure to comply with the checklist.

- ***"The statute directs that the Commission "shall not approve" the requested authorization unless it finds that the criteria specified in section 271(d)(3) are satisfied." Second BellSouth Louisiana Application at para. 13.***
- **Bell Atlantic has not "fully implemented" the competitive checklist, and thus the Commission may not grant its application.**

Option 2: A Political Solution?

(2) Approve application subject to conditions stating that BA could only offer long distance after taking specified steps and proving its performance met appropriate requirements. But:

- (a) FCC should consider scope of its authority to impose conditions of 271 approval
- (b) FCC must provide mechanisms to enable it to reach informed judgment and ensure full compliance with conditions
- (c) FCC must avoid precedent that would allow 271 requirements to be satisfied b mere promises of future compliance. DOJ Eval. at 43.

- "We are concerned also about the precedential implications of relying on promises of future improvement as a basis for approving applications under Section 271. It would be unfortunate if future applicants were less committed to actually opening their markets because of the expectation that it would be sufficient for them to make such promises." DOJ Eval. at 40, n. 107.

The FCC doesn't owe Bell Atlantic anything

Bell Atlantic chose to file on 9/29/1999: no one forced BA to file before it was in compliance with the checklist. BA should not now be permitted to augment its application – indeed, the FCC does not permit it. As DOJ concluded:

- **"The Department starts with a strong presumption – based on the structure and terms of the statute, on the Commission's prior decisions under Section 271, and on the Department's own economic and competitive analyses – that a BOC should be required to demonstrate that all important market opening measures have been completed *before* it may enter the long distance market. Moreover, given the procedural constraints arising from the 90-day review period for Section 271 applications, we strongly support the Commission's prior decisions limiting the ability of applicants to submit data concerning post-application performance in support of their application." DOJ Eval. at 42.**